



GRIC

Foundations for Prosecution Conference

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PROSECUTORIAL ETHICS

Presented by:

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Prosecutorial Power

In the age of Criminal Justice Reform

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Coconino County Attorney
Flagstaff, Arizona
APAAC Summer Conference
June 18, 2020

PREDATORY RABBIS:
THE ORTHODOX SEX ABUSE SCANDAL

HARPER'S

HARPER'S MAGAZINE/OCTOBER 2019 \$7.99

DO WE NEED

THE CONSTITUTION?

A Forum with:

Donna Edwards

Mary Anne Franks

David Law

Lawrence Lessig

Louis Michael Seidman

THE TROUBLE WITH TELEVISION

BEN LERNER'S THE TOPEKA SCHOOL

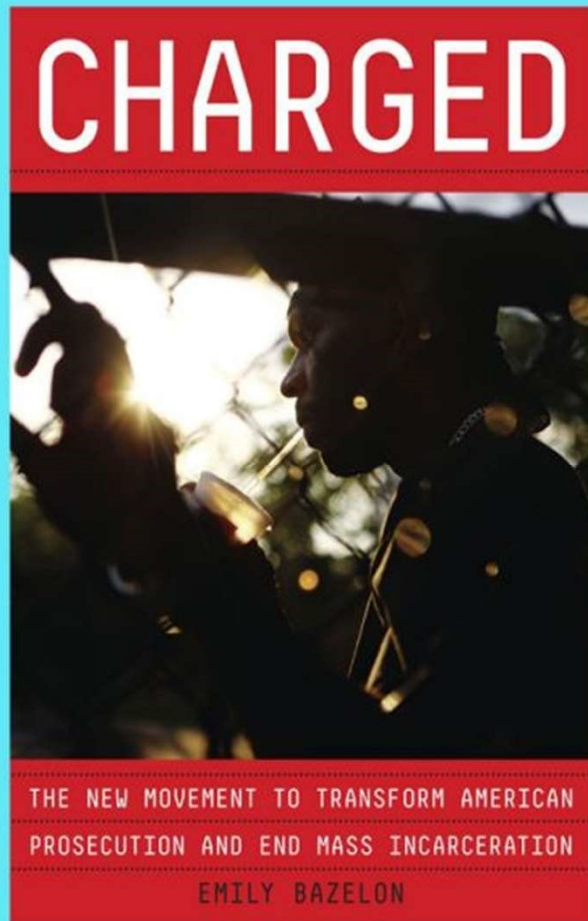
The critical movement to transform prosecution

- ◇ Article, Harper's Magazine, October 2019, Power of Attorney, Andrew Cockburn, author.



“Somewhere along the way, the balance of power between the prosecution, the defense, and the judiciary shifted. We have to readjust it. The stakes are so high—the well-being of so many communities and the trajectories of so many lives. Public safety depends on our collective faith in fairness and our view of the law as legitimate.”

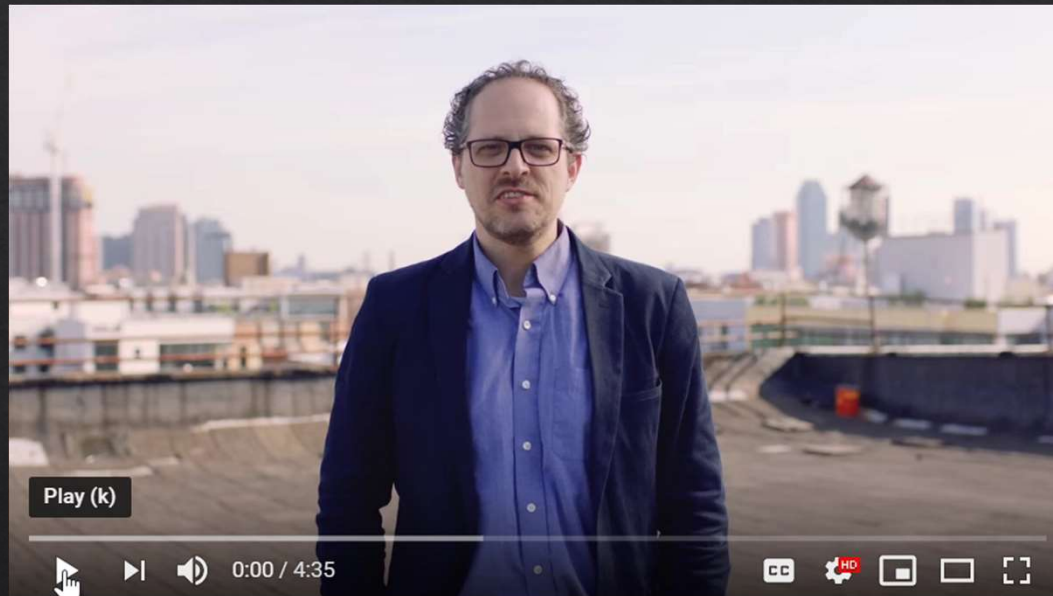
— Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*



“The power imbalance blew my mind, frankly: I couldn’t figure out for the life of me how prosecutors had so much power with so little accountability,”

“The unfettered power of prosecutors is the missing piece for explaining how the number of people incarcerated in the United States has quintupled since the 1980s,”

The critical movement to transform prosecution



The critical movement to transform prosecution



The critical movement to transform prosecution



First Opened November 13, 1989. People who were born that year, on that date, are 31 years old today.

The critical movement to transform prosecution



Reference to the amount of gross revenues Marvel made by demonstrating that Justice is coercive.

Incoherence and Marginalization

- Power is fully criticized but never fully explained. It is just made out to be incoherent. And the Prosecutor is made out to be the anti-hero.
- “Censorship by Noise”. Our silence does not help.
- Prosecutors question their own legitimacy.

Incoherence and Marginalization

The decision to disparage the Prosecutor hinges less upon definitive matters of law than on a set of highly malleable political, moral, and visceral considerations.

Goal:

1. To neutralize the Prosecutor in the debate about law, rule and policy.
2. Proceed with “Smart Justice” on legislative and rule-making fronts.



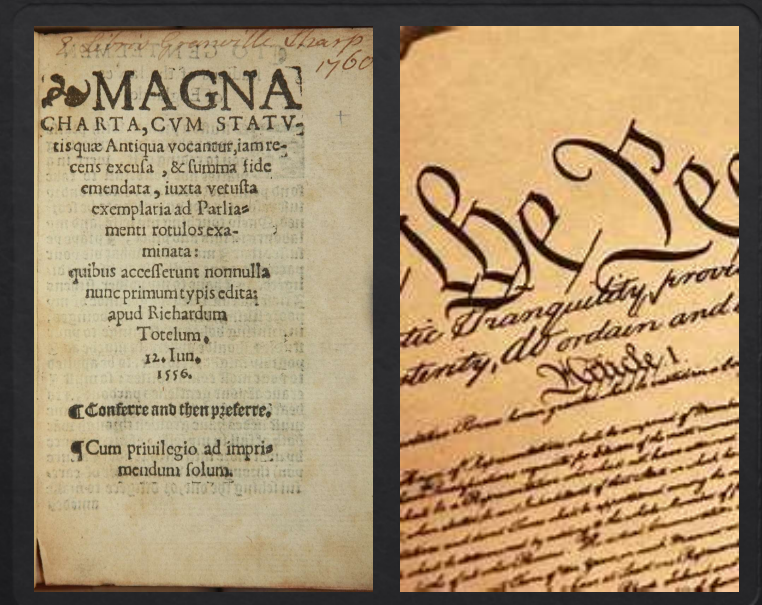
Prosecutor

“One who carries out an action, project, or business.”

“One who carries out a cause in another’s name.”

Prosecutors and the Law of Agency

The political state of
anything is just an idea.



Prosecutors and the Law of Agency

In order to govern at all the Sovereign State needs embodied individuals to actually carry out the business of being the inchoate State.



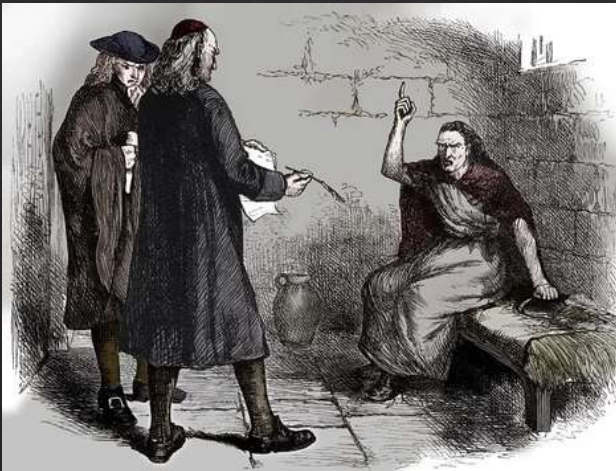
Prosecutors and the Law of Agency

Through law the State defines the roles and methods of the Prosecutor; the qualifications and authority of the Prosecutor; how the position is carried out; or more simply:

Where the position's assignments begin and end.

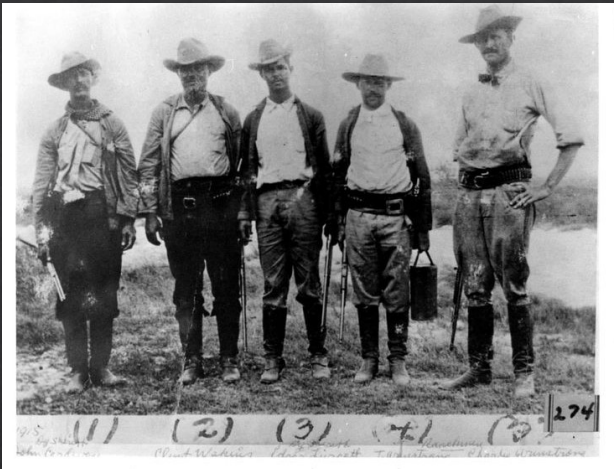


History of the American Prosecutor



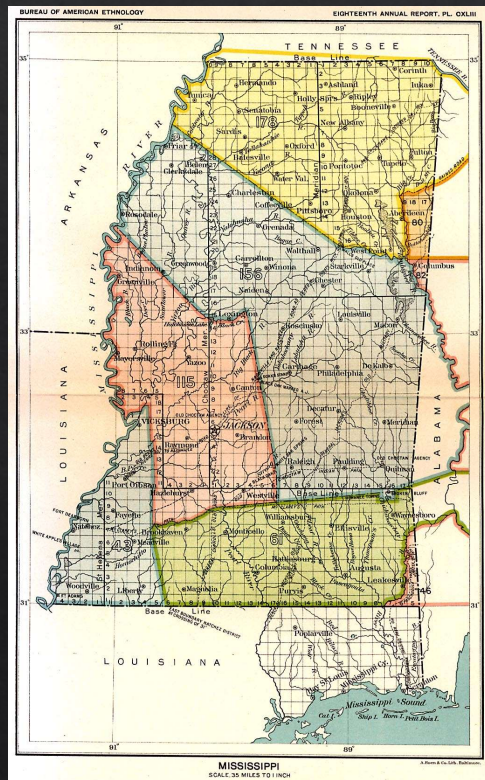
Recasting Prosecutorial Discretion, Robert Misner, *Journal of Criminal Law and Criminology*,
86 J.Crim.L.&Criminology 717, Spring 1996.

History of the American Prosecutor



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History of the American Prosecutor



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History of the American Prosecutor

Common Criticism stated concisely:

Appointed prosecutors are beholden to the top down “at will” politics of the appointment and removal process.

Popularly-elected prosecutors, being relieved of patronage in a bottom-up Election, are executive officials exercising *individual discretion* to enforce laws locally.

In this way the local prosecutor expands “Power”.

Recasting Prosecutorial Discretion, Robert Misner, Journal of Criminal Law and Criminology, 86 J.Crim.L.&Criminology 717, 729-730. Spring 1996.



What you focus on grows, what you
think about expands, and what you
dwell upon determines your destiny.

Robin S. Sharma

“ quote fancy

Power

“ENORMOUS Power”

UNFETTERED Power”

“A TON of Power”

“ALL The Power”

-The popular mythology of prosecutorial power.



Power

The Power of the Prosecutor is the *authority to decide*, and having decided:

- To make that decision *effective* upon *others*.
- To *influence* the outcome of the *next decision* to be made by *others*.

Prosecutorial Power is:



Very
Specific.

Has little in
common with
coercive forces.

Quite Limited.



Prosecutorial Power

- I. It is a specific expertise.
- II. Granted by authority of the State.
- III. Made applicable only through the justice system.
- IV. For the purpose of *seeking* Justice.

I. SPECIFIC EXPERTISE

- Successful Completion of an Undergraduate Degree.
- Preliminary screening through standardized testing and pre-admission application, essays and interviews.
- Three-years of progressively more strenuous legal training.
- Successful Post-Graduate Degree in Law. The J.D.
- Pre-licensing requirement of a state and multi-state admissions exam; and passage of character and fitness review.
- Annual licensing requirements, continuing education, community service, and certification of continuous “good standing” by State Bar Associations.
- State Bar Association supervised by the Arizona Supreme Court.

II. LIMITED AUTHORITY OF THE STATE

- Arizona abolished the notion of common law criminal offenses.
- State law now describes what constitutes a public offense.

Ariz.Rev.Stat. §1-211(C). Ariz.Rev.Stat. §13-101

Only the conduct or omissions proscribed by the Legislature constitute public offenses a prosecutor may pursue.

Public Policy of the Arizona Criminal Code

- Prescribe conduct that unjustifiably and inexcusably
Causes or threatens substantial harm
To individuals or public interests.
- Give fair warning of proscribed conduct and
sentences authorized upon conviction.
- Differentiate between serious and minor offenses.

Public Policy of the Arizona Criminal Code

Insure	Insure public safety.
Impose	Impose Just punishment on those whose conduct threatens the public peace.
Promote	Promote truth and accountability in sentencing.

Ariz.Rev.Stat. §13-101 (cont.).

III. THROUGH THE JUSTICE SYSTEM

Just how a prosecution is undertaken is primarily a matter of Rule.

The driving purpose of the criminal rules are to provide for the just and speedy determination of every criminal proceeding.

ARIZ.CONST. Art. 2, §11; Ariz.R.Crim.P., 1.1. Speedy trial requirements are primarily the responsibility of the prosecutor. See: *State v. Brannin*, 109 Ariz. 525 (1973).

Rules of Evidence

The Arizona Rules of Evidence set guardrails upon what information the State may use to seek a prosecution or conviction.

It is only the *admissible* evidence that can constitute a fair prosecution.

“These Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law,

to the end of ascertaining the truth, and securing a just determination.”

Rule 102,
Ariz.R.Evid.

National Prosecution Standards

A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth.

Justice is not complete without the truth always being the primary goal in all criminal proceedings.

Rules of Procedure

Ariz.R.Crim.P., Rule 1.2 (Jan. 1, 2018).

The Arizona Rules of Criminal Procedure are construed by the Courts, parties and crime victims to:

- secure simplicity in procedure;
- fairness in administration;
- the elimination of unnecessary delay and expense; and
- to protect the fundamental rights of the individual while preserving the public welfare.

IV. TO SEEK JUSTICE

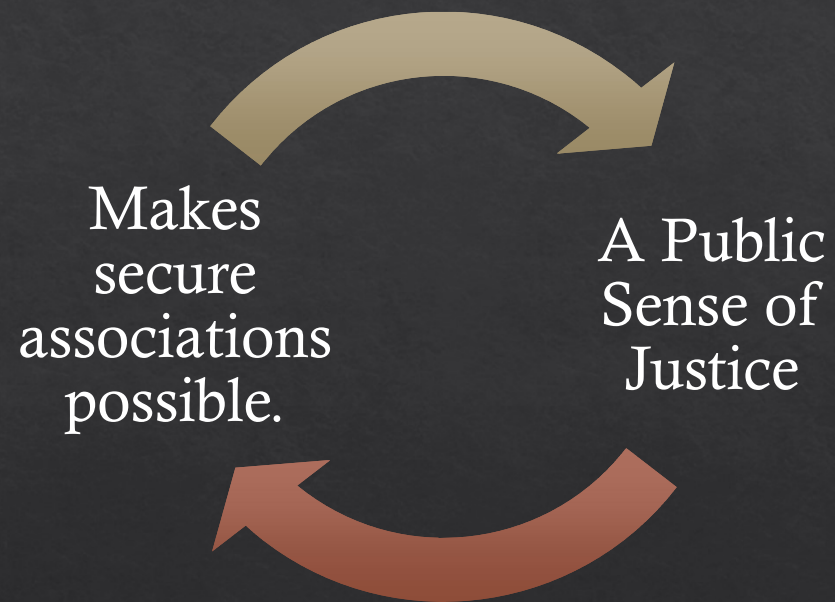
- The First Virtue of Social Institutions.
- John Rawls, *A Theory of Justice* (1971).
For further reference: <https://youtu.be/5-JQ17X6VNg>
Justice Centers Upon The Notion of Basic Fairness.
- Justice Appeals To Our Inherent Bias For Safety, Security, Trust and Cooperation.

A Public Sense of Justice

Society is well ordered when it is:

- Designed to advance the common good; and
- Effective at regulating a public sense of justice.

TO SEEK JUSTICE



Justice and Law

We use law to declare our rational expectations for a Just future:

(a) Before the undesirable circumstances happen. And:

(b) Because the undesirable circumstances will happen.

Prosecutors

The Law assigns persons whose duties are to assure that

When the undesirable circumstances do occur,

Still our outcomes line up with our expectations.

Example: Charging Review

That *a jury*

There is a *sufficient* amount of

By *proof beyond a reasonable doubt*

Admissible evidence

Will convict the defendant of the alleged offense

For the prosecutor to form a *reasonable belief*

ABA Standard 3-4.3(a)

A prosecutor should seek or file criminal charges *only if* the prosecutor *reasonably believes* that the charges are supported by probable cause, that *admissible* evidence will be *sufficient* to support conviction *beyond a reasonable doubt*, and that the decision to charge is in *the interests of justice*.

Preliminary Hearings

State has the burden of establishing probable cause before an impartial magistrate; and

The accused can cross-examine the State's witnesses; and

Argue against the State's conclusions.

Magistrate must dismiss without showing of substantial evidence that an offense was committed and the accused committed it.

Grand Jury proceeding of *sworn citizens*

Who can only indict if they are *convinced*

That it is *more probable than not* that

an offense was committed

And *the accused* committed it.

Indictment

The Mediating Role of Discretion

The interests of Justice support a decision to charge.

The Mediating Role of Discretion

Justice Wisdom Courage Temperance

Temperance - Purposeful Restraint.

Although the State could exercise the full extent of its authority the prosecutor settles for less because it serves a greater good.

The Mediating Role of Discretion

- Not to seek charges at all
- Adjust felony charges to misdemeanor status
- Defer prosecution and divert prosecution
- Adjust charges to make probation available
- Run probation in conjunction with in-patient and outpatient services.
- Provide for probation with restitution for financial offenses.

ABA Standard 3-4.4

Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

- (i) the strength of the case;
- (ii) the prosecutor's doubt that the accused is in fact guilty;
- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (vii) the views and motives of the victim or complainant;
- (viii) any improper conduct by law enforcement;
- (ix) unwarranted disparate treatment of similarly situated persons;
- (x) potential collateral impact on third parties, including witnesses or victims;
- (xi) cooperation of the offender in the apprehension or conviction of others;
- (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
- (xiii) changes in law or policy;
- (xiv) the fair and efficient distribution of limited prosecutorial resources;
- (xv) the likelihood of prosecution by another jurisdiction; and
- (xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

National Prosecution Standards 4-2.4

Charging Factors to Consider

The prosecutor should only file charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

- The nature of the offense, including whether the crime involves violence or bodily injury.
- The probability of conviction.
- The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused criminal history.
- The value to society of incapacitating the accused in the event of conviction.
- The potential deterrent value of prosecution to an offender and to society at large.

National District Attorneys Association, National Prosecution Standards, Third Edition.

National Charging Standard 4-2.4 (cont.)

- The willingness of an offender to cooperate with law enforcement.
- The defendant's relative level of culpability in a criminal activity.
- The status of the victim, including the victim's age or special vulnerability.
- Whether the accused held a position of trust at the time of the offense.
- Excessive costs of prosecution in relation to the seriousness of the offense.
- Recommendation of the involved law enforcement personnel.
- The impact of the crime on the community.
- Any other aggravating or mitigating circumstances.

National District Attorneys Association, National Prosecution Standards, Third Edition.

Rule 42, Arizona Rules of Professional Conduct

E.R. 3.8 Special Responsibilities of the Prosecutor;

E.R. 3.10 Credible and Material Exculpatory Information about a Convicted Person. (Summary).

- Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.
- Assure that the accused of the right and procedure for obtaining counsel.
- Not seek waivers from an unrepresented accused.
- Make timely disclosure of all evidence and information, including mitigation.
- Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.
- Continuing duty of prompt disclosure of new, credible and material, exculpatory evidence.



The Argument

Critics promote the notion that Prosecutors have a Power that is enormous and total and unfettered and coercive. But this is not an argument based upon law.

It is an argument grounded in highly malleable political, moral and visceral concerns. It embodies strong, emotive language to elicit *feelings* over rationality.

The Refutation

The Quantum of Prosecutorial Power

- Strictly limited to statutory offenses set forth by a Legislature.
- Restrained by the public policy for which a Criminal Code exists at all.
- Dependent upon the weight, credibility, and sufficiency of the *admissible* evidence.
- Instituted by experts in criminal law; who are licensed and regulated by the Arizona Supreme Court via the State Bar Association.
- Metered by the necessity for probable cause. And then,
- Ethically filtered through the additional need for a reasonable belief that there is a *sufficient* amount of *admissible* evidence to support a conviction at jury trial by *proof beyond a reasonable doubt*.
- A duty to affirmatively seek the reversal of unjust convictions.
- The weight of our accumulated experience.

The Counterweights to Prosecutorial Power

- The burden of proof.
- The burden of proceeding.
- The defendant's presumption of innocence.
- The defendant's right to silence.
- The defendant's right to assistance of counsel.
- The defendant's right to due process, including speedy prosecution.
- The defendant's right to application of equal protection.
- The defendant's right to trial by jury, and conviction by at least a majority and, in some instances, a unanimous jury.
- The defendant's right to appeal from unjust convictions.
- The defendant's right to plead ineffective assistance of counsel.
- The defendant's presumptive right to bond in most circumstances.

The Counterweights to Prosecutorial Power

A Criminal Justice System
designed to produce acquittals.

Talking Prosecution without Talking Power

